

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PAULINA ACUNA,

Plaintiff,

v.

ANDREW SAUL,

Defendant.

Case No. 2:18-cv-02042-APG-NJK

REPORT AND RECOMMENDATION

(Docket Nos. 20, 21)

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act. The Court has considered Plaintiff’s motion for remand, the Commissioner’s response, the Commissioner’s counter-motion to affirm, and Plaintiff’s response. Docket Nos. 20, 21, 22, 25. This action was referred to the undersigned magistrate judge for a report of findings and recommendation.

I. STANDARDS

A. Judicial Standard of Review

The Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) provides that, “[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . brought in the district court

1 of the United States for the judicial district in which the plaintiff resides.” The Court may enter,
2 “upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing
3 the decision of the Commissioner of Social Security, with or without remanding the cause for a
4 rehearing.” *Id.*

5 The Commissioner’s findings of fact are deemed conclusive if supported by substantial
6 evidence. 42 U.S.C. § 405(g). To that end, the Court must uphold the Commissioner’s decision
7 denying benefits if the Commissioner applied the proper legal standard and there is substantial
8 evidence in the record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686
9 (9th Cir. 2005). The Ninth Circuit defines substantial evidence as “more than a mere scintilla but
10 less than a preponderance; it is such relevant evidence as a reasonable mind might accept as
11 adequate to support a conclusion.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). In
12 determining whether the Commissioner’s findings are supported by substantial evidence, the Court
13 reviews the administrative record as a whole, weighing both the evidence that supports and the
14 evidence that detracts from the Commissioner’s conclusion. *Reddick v. Chater*, 157 F.3d 715, 720
15 (9th Cir. 1998).

16 Under the substantial evidence test, the Commissioner’s findings must be upheld if
17 supported by inferences reasonably drawn from the record. *Batson v. Comm’r Soc. Sec. Admin.*,
18 359 F.3d 1190, 1193 (9th Cir. 2004). When the evidence will support more than one rational
19 interpretation, the Court must defer to the Commissioner’s interpretation. *Burch v. Barnhart*, 400
20 F.3d 676, 679 (9th Cir. 2005). Consequently, the issue before the Court is not whether the
21 Commissioner could reasonably have reached a different conclusion but whether the final decision
22 is supported by substantial evidence.

23 It is incumbent on the Administrative Law Judge (“ALJ”) to make specific findings so that
24 the Court does not speculate as to the basis of the findings when determining if the Commissioner’s
25 decision is supported by substantial evidence. The ALJ’s findings should be as comprehensive
26 and analytical as feasible and, where appropriate, should include a statement of subordinate factual
27 foundations on which the ultimate factual conclusions are based, so that a reviewing court may
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1 know the basis for the decision. *See, e.g., Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir.
2 1990).

3 B. Disability Evaluation Process

4 The individual seeking disability benefits bears the initial burden of proving disability.
5 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must
6 demonstrate the “inability to engage in any substantial gainful activity by reason of any medically
7 determinable physical or mental impairment which can be expected . . . to last for a continuous
8 period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). If the individual establishes an
9 inability to perform his prior work, then the burden shifts to the Commissioner to show that the
10 individual can perform other substantial gainful work that exists in the national economy. *Reddick*,
11 157 F.3d at 721.

12 The ALJ follows a five-step sequential evaluation process in determining whether an
13 individual is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520,
14 416.920). If at any step the ALJ determines that she can make a finding of disability or
15 nondisability, a determination will be made, and no further evaluation is required. *See Barnhart*
16 *v. Thomas*, 540 U.S. 20, 24 (2003); *see also* 20 C.F.R. § 416.920(a)(4). The first step requires the
17 ALJ to determine whether the individual is currently engaging in substantial gainful activity
18 (“SGA”). 20 C.F.R. § 416.920(b). SGA is defined as work activity that is both substantial and
19 gainful; it involves doing significant physical or mental activities usually for pay or profit. 20
20 C.F.R. § 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not
21 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to the second
22 step.

23 The second step addresses whether the individual has a medically determinable impairment
24 that is severe or a combination of impairments that significantly limits him from performing basic
25 work activities. 20 C.F.R. § 416.920(c). An impairment or combination of impairments is not
26 severe when medical and other evidence establish only a slight abnormality or a combination of
27 slight abnormalities that would have no more than a minimal effect on the individual’s ability to
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1 work. 20 C.F.R. § 416.922; Social Security Rulings (“SSRs”) 85-28 and 16-3p.¹ If the individual
2 does not have a severe medically determinable impairment or combination of impairments, then a
3 finding of not disabled is made. If the individual has a severe medically determinable impairment
4 or combination of impairments, then the analysis proceeds to the third step.

5 The third step requires the ALJ to determine whether the individual’s impairments or
6 combination of impairments meet or medically equal the criteria of an impairment listed in 20
7 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 416.920(d), 416.925, 416.926. If the
8 individual’s impairment or combination of impairments meet or equal the criteria of a listing and
9 meet the duration requirement (20 C.F.R. § 416.909), then a finding of disabled is made. 20 C.F.R.
10 § 416.920(d). If the individual’s impairment or combination of impairments does not meet or
11 equal the criteria of a listing or meet the duration requirement, then the analysis proceeds to the
12 next step.

13 Before considering step four of the sequential evaluation process, the ALJ must first
14 determine the individual’s residual functional capacity (“RFC”). 20 C.F.R. § 416.920(e). The
15 RFC is a function-by-function assessment of the individual’s ability to do physical and mental
16 work-related activities on a sustained basis despite limitations from impairments. SSR 96-8p. In
17 making this finding, the ALJ must consider all of the symptoms, including pain, and the extent to
18 which the symptoms can reasonably be accepted as consistent with the objective medical evidence
19 and other evidence. 20 C.F.R. § 416.929; SSR 16-3p. To the extent that statements about the
20 intensity, persistence, or functionally-limiting effects of pain or other symptoms are not
21 substantiated by objective medical evidence, the ALJ must make a finding on the credibility of the
22 individual’s statements based on a consideration of the entire case record. The ALJ must also
23 consider opinion evidence in accordance with the requirements of 20 C.F.R. § 416.927.

24 The fourth step requires the ALJ to determine whether the individual has the residual
25 functional capacity to perform his past relevant work (“PRW”). 20 C.F.R. § 416.920(f). PRW

26 ¹ SSRs constitute the Social Security Administration’s official interpretations of the statute
27 it administers and its regulations. *See Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th
28 Cir. 2009). They are entitled to some deference as long as they are consistent with the Social
Security Act and regulations. *Id.*

1 means work performed either as the individual actually performed it or as it is generally performed
2 in the national economy within the last 15 years or 15 years prior to the date that disability must
3 be established. 20 C.F.R. § 416.960(b). In addition, the work must have lasted long enough for
4 the individual to learn the job and performed at SGA. 20 C.F.R. §§ 416.960(b), 416.965. If the
5 individual has the RFC to perform his past work, then a finding of not disabled is made. 20 C.F.R.
6 § 416.920(f). If the individual is unable to perform any PRW or does not have any PRW, then the
7 analysis proceeds to the fifth and last step.

8 The fifth and final step requires the ALJ to determine whether the individual is able to do
9 any other work considering his residual functional capacity, age, education, and work experience.
10 20 C.F.R. § 416.920(g). If he is able to do other work, then a finding of not disabled is made. The
11 Commissioner is responsible for providing evidence that demonstrates that other work exists in
12 significant numbers in the national economy that the individual can do. *Lockwood v. Comm'r Soc.*
13 *Sec. Admin.*, 616 F.3d 1068, 1071-1072 (9th Cir. 2010).

14 **II. BACKGROUND**

15 A. Procedural History

16 On March 13, 2013, Plaintiff applied for disability insurance benefits under Title II and
17 supplemental security income under Title XVI, alleging a disability onset date of August 15, 2006.
18 Administrative Record (“A.R.”) 399-405, 406-416. Plaintiff’s application was denied initially and
19 on reconsideration. AR 279-300. On October 24, 2014, Plaintiff, Plaintiff’s attorney, a medical
20 expert, and a vocational expert (“VE”) appeared for a hearing before ALJ Phillip C. Lyman. A.R.
21 205-241. On January 21, 2015, the ALJ issued an unfavorable decision finding Plaintiff not
22 disabled. A.R. 248-264. Plaintiff requested review of the ALJ’s decision by the Appeals Council,
23 which granted the request, and on May 4, 2016, the Appeals Council issued an order remanding
24 the matter to the agency for a new hearing. A.R. 270-275, 340. On May 18, 2017, Plaintiff,
25 Plaintiff’s attorney, and a vocational expert appeared for a hearing before ALJ Cynthia R. Hoover.
26 A.R. 176-204. On November 13, 2017, the ALJ issued an unfavorable decision finding Plaintiff
27 not disabled. A.R. 20-30. Plaintiff requested review of the ALJ’s decision by the Appeals Council
28 and, on August 20, 2018, the Appeals Council denied the request, making the ALJ’s decision the

1 final decision of the Commissioner. A.R. 1-8, 398. On October 24, 2018, Plaintiff commenced
2 this action for judicial review pursuant to 42 U.S.C. § 405(g). *See* Docket No. 1.

3 B. The ALJ's Decision

4 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.
5 404.1520 and issued an unfavorable decision on November 13, 2017. A.R. 20-30. At step one,
6 the ALJ found that Plaintiff meets the insured status requirement of the Social Security Act through
7 December 31, 2011, and has not engaged in substantial gainful activity since August 15, 2006.
8 A.R. 22. At step two, the ALJ found that Plaintiff has the following medically determinable severe
9 impairments: degenerative joint disease of the right knee, affective disorder, and anxiety disorder.
10 A.R. 23.

11 At step three, the ALJ found that Plaintiff does not have an impairment or combination of
12 impairments that meets or medically equals the severity of one of the listed impairments in 20
13 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 23-25. The ALJ found Plaintiff has the RFC to
14 perform light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b) except that she can lift
15 twenty pounds occasionally and ten pounds frequently; stand and/or walk for six hours out of an
16 eight hour day; sit for six hours out of an eight hour day; occasionally climb ladders, ropes or
17 scaffolds, but could do other posturals on a frequent basis; Plaintiff would be limited to unskilled
18 work; no contact with the public; and only occasional contact with coworkers and supervisors.
19 A.R. 25-28.

20 At step four, the ALJ found that Plaintiff is unable to perform any past relevant work. A.R.
21 28. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, and
22 RFC, there are jobs that exist in significant numbers in the national economy that Plaintiff can
23 perform. A.R. 29. Therefore, the ALJ found that Plaintiff was not disabled from August 15, 2006,
24 through the date of the decision. A.R. 30.

25 **III. ANALYSIS AND FINDINGS**

26 Plaintiff submits that the ALJ's RFC finding did not adequately capture the limitations of
27 Plaintiff's examining physician and did not fully account for the opinion of Plaintiff's treating
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1 physician. Docket No. 20 at 6-11.² Plaintiff additionally submits that the ALJ improperly rejected
2 her testimony, and that the ALJ's step five finding is not supported by substantial evidence because
3 the ALJ improperly omitted Plaintiff's allegations when posing hypothetical questions to the
4 vocational expert. *Id.* at 11-13.

5 In response, and on counter motion to affirm, the Commissioner submits that substantial
6 evidence supports the ALJ's evaluation of the medical evidence, Plaintiff's subjective allegations
7 of disabling symptoms, and the step five finding relying on the vocational expert's testimony.
8 Docket No. 21 at 4-16. The Commissioner submits that the ALJ need not accept the opinion of
9 any physician if the opinion is brief, conclusory, and inadequately supported by clinical findings
10 and that an examining physician's opinion constitutes substantial evidence because it rests on an
11 independent examination of the claimant. *Id.* at 5-6. The Commissioner additionally submits that
12 substantial evidence supports the ALJ's specific and legitimate reasons for rejecting the
13 physician's opinions. *Id.* at 6-10. The Commissioner further submits that the ALJ provides valid
14 reasons, based on substantial evidence, for finding that Plaintiff's testimony of disability was not
15 consistent with the record evidence, and demonstrates that she did not arbitrarily discredit
16 Plaintiff's subjective complaints. *Id.* at 11. Finally, the Commissioner submits that the ALJ
17 properly used the expertise of a vocational expert in step five to determine whether Plaintiff could
18 perform other work that existed in significant numbers. *Id.* at 16.

19 In reply, Plaintiff submits that the ALJ did not provide clear and convincing reasons for
20 rejecting the uncontroverted opinion of a treating or examining doctor. Docket No. 25 at 1.
21 Plaintiff submits that the ALJ's finding failed to adequately capture the limitations described by
22 the doctors. *Id.* at 4. Plaintiff additionally submits that the ALJ improperly rejected her testimony
23 by singling out a few periods of temporary well-being from a sustained period of impairment in
24 order to discredit Plaintiff. *Id.* at 5. Finally, Plaintiff submits that the ALJ's finding is not
25 supported by substantial evidence because the ALJ improperly omitted the limitations assessed by
26 Plaintiff's doctors when examining the vocational expert. *Id.* at 6-7.

27 ² The pagination on Docket No. 20 is not consistent with the CM/ECF pagination. The
28 citations herein refer to the pagination provided by CM/ECF.

1 A. Evaluation of the Medical Evidence

2 The ALJ is responsible for establishing a claimant's RFC, or the most a claimant can do,
3 based on medical and non-medical evidence. 20 C.F.R. §§ 404.1545-404.1546. Greater weight is
4 usually afforded to the opinion of a treating physician due to the opportunity to know and observe
5 the individual; however, the ALJ may disregard the treating physician's opinion whether or not
6 that opinion has been contradicted. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The
7 ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is
8 brief, conclusory, and inadequately supported by clinical findings. *Thomas v. Barnhart*, 278 F.3d
9 947, 957 (9th Cir. 2002). An examining physician's opinion alone "constitutes substantial
10 evidence, because it rests on his own independent examination." *Tonapetyan v. Halter*, 242 F.3d
11 1144, 1149 (9th Cir. 2001). Opinions of non-examining physicians may serve as substantial
12 evidence when the opinions are consistent with clinical findings or other evidence in the record.
13 *Thomas*, 278 F.3d at 957. An ALJ may rely on a non-examining physician's opinion to determine
14 a claimant's limitations. *Bray v. Comm'r of Soc. Sec. Admin*, 554 F.3d 1219, 1221-1222 (9th Cir.
15 2009).

16 Here, the ALJ concluded that, despite Plaintiff's impairments, she had the mental RFC to
17 perform unskilled work with no contact with the public and only occasional contact with
18 coworkers and supervisors. A.R. 25. First, the ALJ found that the record indicated that Plaintiff
19 complained of depression, poor social skills, paranoia, anxiousness, panic attacks, hypervigilance,
20 mood swings, having few friends, difficulty leaving her home, and having suicidal thoughts at
21 times. A.R. 26. However, the ALJ also noted that, despite these allegations, the record indicated
22 that Plaintiff appeared to be properly groomed and cooperative with normal thought content, good
23 judgment, good insight, and average intelligence. *Id.* Further, the ALJ found that there were less
24 optimal findings as well, including that Plaintiff appeared depressed, stiff and anxious with mood
25 swings, irritable, panic attacks, mild signs of slow thoughts/physical movements, slow information
26 processing and diagnoses of depression and anxiety. A.R. 26. The ALJ found that Plaintiff was
27 prescribed medication, including Xanax, Zoloft, and Klonopin for these impairments. *Id.*
28 Additionally, the ALJ found that Plaintiff had one inpatient psychiatric hospitalization during the

1 relevant period with concerns noted as to her opiate use and Klonopin withdrawal. A.R. 26. The
2 ALJ also found that Plaintiff was starting to get out of the house more recently, and that treatment
3 notes indicated she was “interactive, appropriate, and appeared to be doing all right, despite some
4 continued anxiousness.” A.R. 28. Further, Plaintiff’s mood swings and panic attacks were often
5 reported as “mild” or “very mild,” she denied suicidal or homicidal ideation and reported
6 improvement on medication treatment, and she testified she had good relationships with her
7 family, met regularly with her therapist, and regularly attended church and weekly therapy
8 appointments. A.R. 28, 105, 108, 669-671, 673-674, 1019-1020.

9 Second, the ALJ found that Dr. Devera’s³ opinions regarding Plaintiff’s limitations were
10 consistent with treatment notes that she suffered from mild panic attacks, mood swings, and
11 irritability, and that substantial evidence in the record, including Dr. Devera’s own examination
12 findings, supported these findings. A.R. 27. Still, the ALJ rejected Dr. Devera’s opinion that
13 Plaintiff is unable to work because she found that it was unsupported and inconsistent with Dr.
14 Devera’s other statements about Plaintiff’s condition, including that she displayed appropriate
15 grooming, clear speech, logical and coherent organization of speech, normal thought process,
16 adequate ability to move onto different topics while remaining alert, no looseness of association,
17 tangentiality, or obsessional or compulsive ideation. A.R. 24, 28. The record further indicates
18 that cognitive testing showed that Plaintiff was unimpaired in memory recall, could complete some
19 computing and alphanumeric tasks, and was unimpaired in abstract information. A.R. 682-683.
20 The ALJ found that Dr. Devera’s opinion of disability was therefore unsupported and inconsistent
21 with her own findings and other findings in the record.

22 Third, the ALJ found that Dr. Zedek’s July 2013 opinion that Plaintiff had difficulty
23 handling stress, completing tasks and being around others, but that she was coherent and could
24 handle decision-making for herself though she would need help at times, to be supported by and
25 consistent with his treatment notes and information in the record. A.R. 24, 27-28. The ALJ
26 discounted Dr. Zedek’s September 2014 opinion that Plaintiff’s condition is likely to deteriorate

27 ³ The ALJ appears to refer to Dr. Aisha Devera as Devera Aisha, PsyD, and Dr. Aisha.
28 According to the record, Dr. Aisha Devera is correct. See A.R. 678.

1 based on the fact that Dr. Zedek had stopped seeing Plaintiff in June 2014, and that his opinion
2 contradicted his most recent treatment note which indicated improvement in Plaintiff's treatment
3 over the last few months. A.R. 27, 905. The ALJ found that Dr. Zedek determined that Plaintiff
4 could manage her finances, was alert and oriented, had good insight and judgment, had well-
5 delineated futuristic thoughts and plans, had no suicidal or homicidal ideations, and did not feel
6 depressed or mildly depressed. A.R. 24, 717-729, 764-770, 893-904.

7 The ALJ gave great weight to the opinions of Dr. Leaf that Plaintiff could engage in simple,
8 routine tasks with limited social interaction demands and minimal change in the work
9 environment. A.R. 26. The ALJ found Dr. Leaf's opinion to be consistent with the reports of
10 some difficulties with complex tasks and social functioning, but that Plaintiff could perform one-
11 step or two-step instructions with no impairments and detailed instructions with mild impairment.
12 A.R. 26-27.

13 In considering the entire record, the Court finds that the ALJ properly weighed the medical
14 opinions based on information in the record, including the objective clinical findings and treatment
15 records.

16 B. Plaintiff's Testimony

17 A claimant's statements as to symptoms cannot, alone, be conclusive evidence of disability.
18 42 U.S.C. § 423(d)(5)(A). An ALJ is required to make findings as to the veracity of the claimant's
19 subjective statements. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2009). Therefore, in
20 determining whether a claimant's testimony regarding subjective pain or symptoms is credible, an
21 ALJ must engage in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir.
22 2007). First, the ALJ must determine whether the claimant has presented objective medical
23 evidence of an underlying impairment which could reasonably be expected to induce the pain. *Id.*
24 at 1036. Once a claimant establishes an underlying impairment, the ALJ must then evaluate
25 whether the statements about the severity of the symptoms are consistent with (1) the objective
26 medical evidence; and (2) the other evidence in the record. 20 C.F.R. § 404.1529(c)(2)-(3). It is
27 the ALJ's prerogative to analyze whether and, to what extent, the claimant's statements about
28 symptoms are consistent with the record. *Molina v. Astrue*, 674 F.3d 1104, 1120-21 (9th Cir.

1 2012). The ALJ's assessment of the subjective claims must be properly supported by the record
2 and sufficiently ensure a reviewing court that the ALJ did not arbitrarily discount a claimant's
3 subjective testimony. *Id.* In weighing a claimant's testimony, the ALJ may consider numerous
4 factors including duration, frequency, intensity of pain, medication, and "ordinary techniques of
5 credibility evaluation." *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991). The ALJ may also
6 consider discrepancies in a claimant's statements, exaggerated complaints, and inconsistencies
7 between a claimant's statements and activities. *Thomas*, 278 F.3d at 958.

8 Here, the ALJ found that, while Plaintiff's medically determinable impairments could
9 reasonably be expected to produce some of the alleged symptoms, a lack of objective support for
10 Plaintiff's allegations existed in the record. A.R. 26-28. First, the ALJ found that, while the record
11 contained Plaintiff's complaints of depression, anxiety, panic attacks, difficulty leaving the house,
12 and some less optimal examination findings, her medical status examinations otherwise indicated
13 that she was cooperative, displayed good insight and judgment, had organized and clear speech
14 and thought process, denied suicidal ideation, had unimpaired memory, had only mild impairment
15 in abstract thinking, had mild mood swings, and was consistently alert and oriented. A.R. 26-28.

16 Second, the ALJ found that Plaintiff's allegations of disability were inconsistent with
17 evidence-based physician statements and opinions. A.R. 27-28. Specifically, Dr. Leaf and Dr.
18 Devera opined that Plaintiff was able to perform a range of one-step and two-step instructions and
19 Dr. Zedek opined that Plaintiff was able to make decisions on her own most of the time. A.R. 24-
20 28.

21 Further, the ALJ found that Plaintiff's testimony was inconsistent with the evidence in the
22 record showing that Plaintiff engaged in activity that conflicted with her claims of being further
23 restricted. A.R. 28. For example, the ALJ noted that, despite Plaintiff's claims of physical
24 impairments, she stated she could do household chores including vacuuming and laundry and that,
25 despite Plaintiff's mental restrictions, she regularly attended church, kept up with weekly therapy
26 appointments, and was becoming more interactive according to Dr. Zedek's notes. A.R. 24, 28.

27 Accordingly, based on a review of the entire record, the Court finds that the ALJ properly
28 discounted Plaintiff's testimony.

1 C. Step-Five Finding

2 The ALJ may satisfy the step-five burden through vocational expert testimony. *Osenbrock*
 3 *v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). Where the ALJ uses testimony of a vocational expert
 4 at step five, the vocational expert must identify specific jobs in the national economy having
 5 requirements that the claimant's physical and mental abilities and vocational qualifications would
 6 satisfy. *Id.* at 1162-1163. Hypothetical question posed to the vocational expert must set out all
 7 the limitations and restriction of the particular claimant. *Embrey v. Bowen*, 849 F.2d 418, 423 (9th
 8 Cir. 1988).

9 Here, Plaintiff contends that the ALJ erred in posing hypothetical questions to the
 10 vocational expert that omitted Plaintiff's credible allegations. Docket No. 20 at 13; *See Embrey v.*
 11 *Bowen*, 849 F.2d 418, 423 (9th Cir. 1988). However, the ALJ was not required to include the
 12 hypothetical limitations based on Plaintiff's allegations because the ALJ previously discounted
 13 these limitations after finding that the limitations were not supported by the overall evidence in
 14 the record. *See id.*; *see also Osenbrock*, 240 F.3d at 1164-1165. Accordingly, the ALJ properly
 15 found that at least one job existed in significant numbers that an individual with Plaintiff's RFC
 16 could perform.

17 Accordingly, having reviewed the entire record, the Court finds that the ALJ did not err in
 18 the step five finding that Plaintiff was not disabled.

19 **IV. CONCLUSION**

20 For these reasons, the undersigned concludes that the ALJ's findings are supported by
 21 substantial evidence and, therefore, that he did not err in finding that Plaintiff is not disabled.
 22 Accordingly, the undersigned hereby **RECOMMENDS** that Plaintiff's motion for reversal and/or
 23 remand, Docket No. 20, be **DENIED** and that the Commissioner's counter-motion to affirm,
 24 Docket No. 21, be **GRANTED**.

25 Dated: July 9, 2019

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 NANCY J. KOPPE
 United States Magistrate Judge

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within 14 days of service of this document.**

The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley Unified Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).